No. 16142

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RAYMOND PAE, also known as KEALOHAKALANI LIU,

Plaintiff-Appellant,

vs.

RUTH LEHUA STEVENS, SAMUEL STEVENS, also known as BOYD STEVENS, and KAM TAI LEE, TREASURER OF THE TERRITORY OF HAWAII,

Defendant-Appellee.

Appeal from the Supreme Court for the Territory of Hawaii

APPELLEES' ANSWERING BRIEF

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STAR-BULLETIN PRINTING CO., INC.

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JURISDICTIONAL STATEMENT

This is an appeal from the Supreme Court of the Territory of Hawaii. The proceedings originated in the Circuit Court of the First Judicial Circuit where judgment was rendered in favor of the appellee, which judgment was affirmed on appeal to the Supreme Court of the Territory of Hawaii. After an appeal to this Court (No. 15498), the case was re-

manded to the Supreme Court for clarification. A hearing was duly had and the Supreme Court again affirmed the judgment for the appellee. The present appeal stems from this second decision of the Supreme Court of the Territory of Hawaii.

Jurisdiction of this Court derives from 28 U.S.C. 1293 as this is a civil case where the value in controversy exceeds $5,000, exclusive of interest and costs.

STATEMENT OF THE CASE

The facts of this case are set out in, and the Court is referred to, *Pae* v. *Stevens,* No. 15498 (9 Cir., Feb. 18, 1958).

QUESTIONS PRESENTED

1. Whether the statutory requirement of exhaustion of remedies is a condition precedent or an affirmative defense?
2. Whether other remedies for the recovery of his land were available to appellant?
3. Whether appellant had exhausted his remedies?

ARGUMENT

I

THE COURT MAY MODIFY THE JUDGMENT OF THE SUPREME COURT OF HAWAII ONLY IF IT IS MANIFESTLY ERRONEOUS.

The question on appeal is whether the judgment of the Supreme Court of the Territory of Hawaii is manifestly erroneous so as to require this Court to disturb that judg-

ment. This rule, governing appeals of this nature, was set by the Supreme Court of the United States in *Waialua Agricultural Co.* v. *Christian,* 305 U.S. 91, 59 S. Ct. 21 (1938); rehearing denied, 305 U.S. 673, 59 S. Ct. 240; at page 109:

> "It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. . . . In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii."

This rule has been followed by this Court in *Pioneer Mill Co.* v. *Victoria Ward,* 158 F.2d 122 (9 Cir. 1946), cert. den., 330 U.S. 838, 67 S. Ct. 979, and more recently in the prior appeal of this case. *Pae* v. *Stevens,* No. 15498 (9 Cir. Feb. 18, 1958).

There are no issues relating to the Constitution of the United States or to the laws of the United States. The issues are matters solely of local law, more specifically section 342-99 of the Revised Laws of Hawaii 1955 (section 5099, Revised Laws of Hawaii 1935, at the time of the commencement of this suit). Section 342-99 provides in part as follows:

> "*Actions for compensation for fraud, mistake, etc.* Any person who, without negligence on his part,

> sustains loss or damage, or is deprived of land or of any estate or interest therein, after the original registration of land under this chapter, by the registration of any other person as owner of such land, or of any estate or interest therein, through fraud, or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry of memorandum in the registration book, may bring and prosecute an action of contract in the circuit court for the recovery of compensation for such loss or damage or for such land or estate, or interest therein; provided, that when the person deprived of land or of any estate, or interest therein, in the manner above stated, has a right of action or other remedy for the recovery of the land or of the estate, or interest therein, he shall exhaust the right of action or other remedy before resorting to the action of contract herein provided. . . ."

This statute was the legal basis for the cause of action that appellant instituted. It was by measuring the facts to these same provisions that the Supreme Court of the Territory of Hawaii decided that appellant was not entitled to recover compensation for the loss of his interest in parcel 1 from appellee, Kam Tai Lee, Treasurer of the Territory of Hawaii. We submit that this judgment is not only not manifestly erroneous but the only proper one that that court could have rendered under the circumstances of both law and fact.

The Hawaii Supreme Court agreed with this Court that the common law rule of consensual incapacity of minors did apply to the statutory cause of action set out above and thus ruled that appellant could not be bound by his negligence in pursuing this contract action. At the same time, however, the Court reaffirmed its position that appellant was required, by statute, to exhaust his other remedies, and,

not having done so, was thus not entitled to compensation. Just as this Court found the common law rule of consensual incapacity of minors applicable to the cause of action provided in section 342-99, the Hawaii Supreme Court found that the said common law rule applied to transfers of registered land, thus concluding that appellant, then a minor, could have rescinded the transaction and recovered his land from his immediate purchasers.

II

THE EXHAUSTION OF THE RIGHT OF ACTION OR OTHER REMEDY REQUIRED BY SECTION 342-99, REVISED LAWS OF HAWAII 1955, IS A CONDITION PRECEDENT TO THE ACTION OF CONTRACT PROVIDED THEREIN.

Section 342-99, Revised Laws of Hawaii 1955, provides in part:

> **". . . that when the person deprived of land or of any estate, or interest therein, in the manner above stated, has a right of action or other remedy for the recovery of the land or of the estate, or interest therein, he shall exhaust the right of action or other remedy *before resorting* to the action of contract herein provided. . . ." (Emphasis supplied.)**

It is of utmost importance to always bear in mind, in the consideration and resolution of the issue before us, the fact that we are here dealing with a statutory cause of action. Since the statute creates the right of action, all conditions attached to that right must be satisfied before one can avail himself of the right of action.

Although what is here involved is a matter of construction of a specific statute, the following discussion of cases dealing with similar statutes is submitted as an indication of what disposition was made by other courts in similar circumstances to provide an understanding of the problem and guidance to this Court.

In *Jensky* v. *State Board of Equalization,* 155 P. 2d 87 (1945) the court was faced with the question of whether plaintiffs-appellants had to exhaust administrative remedies before having recourse to the courts. The applicable California statute (Sec. 46, Stats. 1937) provided in part as follows:

> "The person affected by any ruling, order or decision of the board * * * on suspension or revocation of a license may, *after exhausting the remedies such person may have with, the board,* and within thirty days after *final* action by the board, file an action in the superior court of California in and for the county of Sacramento."

On page 89, the court said:

> ". . . In its present form as above stated it plainly provides that only after exhausting the remedies such person may have with the board, and after *final* action by the board, may an action be filed in the superior court."

And to make its position clearer the court added in the following paragraph on the same page:

> "Appellants' complaint entirely fails to show that before filing this action they filed any written objections to the findings or any petition for a reconsideration by the board, or that any hearing de novo by such board was ever asked or had. On the contrary, the allegation of the complaint that said order

> has no support whatsoever 'under the testimony and evidence submitted to and received by said representative of said board,' indicates that no resort to the board itself for a hearing was had, and that said matter was not heard de novo by it, but that its order which appellants seek to have reviewed by the court was based solely upon the findings of its representative before whom the hearing was had pursuant to section 41 of the Act. Plainly, then, appellants failed to show that they had complied with the very requirements of section 46, that before filing an action in the superior court they must have exhausted their remedies before the board, and the action of the board must have become final."

Accordingly, the court found that appellants could not institute an action for judicial relief.

In *United States* v. *Felt & Tarrant Co.,* 283 U.S. 269 (1931) the Supreme Court was called upon to review a judgment allowing plaintiff a recovery of income and excess profit taxes alleged to have been illegally exacted. The sole objection to the recovery was that there was not compliance with section 1318 of the Revenue Act of 1921, 42 Stat. 314, which provided that:

> " 'no suit . . . shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been . . . illegally . . . collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury. . . .' "

The Court found that there was not compliance with this provision and thus reversed the judgment below. The Court said at page 272:

> "The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. [citations.]"

And on page 273:

> "... Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' *Rock Island R.R.* v. *United States,* 254 U.S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, *Tucker* v. *Alexander, supra;* but it is not within the judicial province to read out of the statute the requirement of its words. *Rand* v. *United States,* 249 U.S. 503, 510."

Ertle v. *United States,* 93 F. Supp. 619 (Ct. of Claims, 1950) draws into a finer focus the holding of the *Felt & Tarrant Co.* case. This was a suit to recover taxes allegedly paid under protest. Defendant demurred. The court addressed itself to the same section of the Internal Revenue Code, then section 3772 of Title 26 of the United States Code (presently 26 U.S.C. 7422). The court said:

> "The petition, however, does not allege that plaintiffs or any of them at any time filed a claim for refund of the amount of the tax penalty." p. 619.
>
> "We have no choice but to sustain the demurrer. The provision of the statute is plain. The filing of a claim for refund is an essential condition to the maintenance of a suit to recover amounts claimed to have been illegally collected. [citations]" p. 620.

The same intimation that the condition precedent must be pleaded by plaintiff appears in *Red Wing Malting Co.*

v. *Willcuts,* 15 F.2d 626 (8 Cir. 1926) cert. den. 273 U.S. 763, 47 S.Ct. 476. The court (it appears from the context) was presumably referring to the same statute when it said:

> ". . . It does not appear from the record that any claim under subsection (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to bringing this action, and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this court in matters of this character. . . ." p. 634.

The *Felt & Tarrant Co.* case has been construed to mean "that a claim for refund which sets forth all the material facts which from the basis of the action to be brought is an essential *condition precedent* to the right to recover by suit." *Ronald Press Co.* v. *Shea,* 114 F.2d 453,455 (2 Cir. 1940). Other cases which have likewise put a similar interpretation on the language of section 7422 of Title 26 U.S.C. are,

Scovill Manufacturing Company v. *Fitzpatrick,*
215 F. 2d 567, 569 (2 Cir. 1954)
Bryan v. *United States,*
99 F. 2d 549, 552 (10 Cir. 1938) cert. den.
305 U.S. 661, 59 S.Ct. 364
Lynch v. *Rogan,*
50 F. Supp. 356, 357 (S.D. Calif. 1943)
See *Harvey* v. *Early,*
160 F. 2d 836, 838 (4 Cir. 1947).

In *Rock Island, Arkansas & Louisiana Railroad Company* v. *United States,* 254 U.S. 141 (1920) the court was faced with the same problem. A claim had been filed in the Court of Claims for the recovery of taxes paid. The court dismissed the petition on the grounds that claimant had not complied

with that section of the law that no suit for the recovery of taxes shall be maintained in any court " 'until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: . . . ' " Rev. Stats., sec. 3226, amended by Act of February 27, 1877, c. 69, sec. 1, 19 Stat. 248. The judgment of the court below was affirmed, and the Court, speaking through Mr. Justice Holmes, said:

> "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. *Lex non praecipit inutilia* (Co. Lit. 127*b*) expresses rather an ideal than an accomplished fact. But in this case we cannot pronounce the second appeal a mere form. On appeal a judge sometimes concurs in a reversal of his decision below. It is possible as suggested by the Court of Claims that the second appeal may be heard by a different person. At all events the words are there in the statute and the regulations, and the Court is of opinion that they mark the conditions of the claimant's right. . . ." p. 143.

In the federal tax cases, (except the *Rock Island Railroad* case), the condition precedent of having to file a claim for refund or credit is stated in the following language: "until a claim for refund or credit has been duly filed . . ." no suit shall be maintained.

In the California *Jensky* case, the governing language was: "after exhausting the remedies such person may have with the board," the person may file an action.

In this appeal, the corresponding provision states: "before resorting to the action of contract . . . he shall exhaust the right of action or other remedy . . . . "

The sense of each of these three provisions is that something must be done before the actions respectively provided for therein can be maintained. The only differences are of sentence structure and the use of three different prepositions, "until," "after," and "before," respectively. If the language of the first two instances is said to make the filing of a claim or the exhaustion of remedies conditions precedent to the filing of an action, then also must exhaustion of remedies as required in the third instance, more specifically as in section 342-99, Revised Laws of Hawaii 1955, be a condition precedent to the maintaining of the action in contract provided in the same section of the laws.

Underlying this requirement of exhaustion of remedies is the policy that this action of contract should serve only as an alternative and secondary avenue of obtaining relief. This is the policy which is reflected in the extended period of limitations for this action in contract when an action for the recovery of land is initially instituted. Section 342-104, Revised Laws of Hawaii 1955. This is the policy that prompted the inclusion of the last sentence of section 342-99, which states:

> "If the plaintiff elects to pursue his remedy in tort, and also brings an action of contract under this chapter, the action of contract shall be continued to await the result of the action of tort."

This sentence then, in turn, points up the fact, that, while simultaneity of actions was a possibility appreciated by the legislature and permitted under these special circumstances,

the preceding portion of section 342-99 dealing with exhaustion of rights and remedies "before resorting to the action of contract" meant exactly what was said: that before one could maintain the statutory action of contract, he was required to fulfill the condition precedent to exhausting his rights and other remedies for recovery of his lands.

By section 342-100, Revised Laws of Hawaii 1955, the Treasurer of the Territory is made the party defendant. This, coupled with the fact that payments in satisfaction of any judgment may have to be paid from the general fund of the Territory (section 342-101, RLH 1955) instead of from a special assurance or indemnity fund limited to this purpose, in effect, makes the cause of action of contract provided for in section 342-99, one against the Territory itself. Under such circumstances the thinking of the United States Court of Appeals for the Tenth Circuit as expressed in *Bryan* v. *United States, supra,* is especially appropriate.

> "Immunity from suit is an attribute of sovereignty. The United States can only be sued by its own consent clearly given by legislative act. When Congress gives its consent to be sued it does not grant a right, but merely accords a privilege. Statutes granting the right to sue the United States are to be strictly construed. Congress may impose such conditions and restrictions on the right to sue the United States as it deems proper. A suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued. The courts cannot go beyond the letter of such consent." 99 F. 2d at p. 552.

III

APPELLANT, BEING A MINOR, COULD HAVE RECOVERED THE LAND TRANSFERRED DURING HIS MINORITY TO JORDAN AND CARRIE FREITAS, ASSUMED TO BE BONA FIDE PURCHASERS FOR VALUE, BECAUSE OF THE PROTECTION AFFORDED MINORS IN MATTERS OF CONTRACT.

The Hawaii Supreme Court determined that appellant could have recovered the land he owned from Jordan Freitas and Carrie Freitas even if they were bona fide purchasers for value.

In Hawaii, the common law rule that infants are protected in matters of contract applies. *(Rathburn* v. *Kaio,* 23 Haw. 541 (1916); *Jellings* v. *Pioneer Mill Co.,* 30 Haw. 184 (1927); *McCandless* v. *Lansing,* 19 Haw. 474 (1909); *Kekai* v. *Waipio Limalau,* 16 Haw. 464 (1905).) The *Rathburn* case has already been accepted by this Court for this proposition. (See *Pae* v. *Stevens,* No. 15498 (9 Cir. Feb. 18, 1958).)

In *McCandless* v. *Lansing, supra,* X, stating that she was born on June 17, 1881, conveyed the land in dispute to defendant on September 18, 1901. On April 22, 1907, X again conveyed the same piece of land by quitclaim deed to the plaintiff. The facts showed that X was born in 1886. (By section 330-1, Revised Laws of Hawaii 1955, majority is set at age 20.) Upon being satisfied that the disaffirmance of the first deed by X was done within a reasonable time, the court ordered a verdict for plaintiff.

In *Jellings* v. *Pioneer Mill Co., supra,* the court said at page 186:

> "The deed of a minor, it is well settled, is voidable and not void and may be avoided by the grantor, after reaching majority, by some act of disaffirmance."

That this common law rule should govern the question of availability of remedies in this instance is mandated by the law. Section 1-1, Revised Laws of Hawaii 1955 (then section 1, Revised Laws of Hawaii 1935), provides as follows:

> "Sec. 1-1. *Common law of Territory; exceptions.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory."

This Court, in its previous consideration of this case, stated:

> "Under the common law, based upon feudal antecedents, the consensual incapacity of a minor was absolute, except as to a contract for necessities. In land law, the doctrine has never been relaxed in any jurisdiction where the common law has been adopted. Indeed, the theory has affected other branches of the law where the interests of minors have been brought in question." *Pae* v. *Stevens, supra,* p. 6.

On the appropriateness of applying the common law rule, this Court ruled thusly:

> "The statute of Hawaii which sets out the sources of law of the jurisdiction expressly declares that the common law of England is the common law of the Territory of Hawaii in all cases 'except as otherwise expressly provided' by (1) the Federal Constitution, (2) statutes of the Territory of Hawaii, (3) Hawaiian judicial precedent or Hawaiian usage. No federal rights or issues arising from the Constitution or laws of the United States are here present. The Supreme Court of Hawaii refers to no usage of the Islands, which affects the disposition of the case at bar. Furthermore, no instance is quoted or cited to us where the judges have heretofore filled in lacunae in the law upon the subjects under consideration. Therefore, except as expressly otherwise provided, this statute is to be construed in the light of the common law. Furthermore, since the Torrens Land Registration Law was originated in Australia and has been adopted in several states of the Union in a common law atmosphere, the adoption of this test is normal and appropriate." *Pae* v. *Stevens, supra,* pp. 5, 6.

This comment is appropriate in this determination of the issue now before the Court. The Hawaii Supreme Court has this time "quoted or cited where the judges have heretofore filled in lacunae in the law upon the subject[s] under consideration." It has cited cases (*Jellings* v. *Pioneer Mill Co., supra; McCandless* v. *Lansing, supra*) showing that the common law rule of consensual incapacity of minors prevails in Hawaii and that there has been no relaxation of this rule in land matters in Hawaii.

The statutes in Hawaii governing the transfer of registered land do not "expressly provide otherwise," i.e. the common law rule of consensual incapacity of minors is not expressly made inapplicable to the conveyancing of registered land.

Appellant on page 8 of his opening brief states that because section 342-55, Revised Laws of Hawaii 1955, does not mention infancy as a ground for avoiding a subsequent registration of land while mentioning forgery, minority is thus not grounds for avoiding a conveyance of a minor of registered land. The conclusion is not sound, nor its espousal convincing. In the first appeal to this Court, appellant loudly championed the rule that in pursuing a statutory cause of action provided for in Hawaii's land registration act a minor was excepted from the provision of non-negligence required of persons pursuing the remedy set out in section 342-99, Revised Laws of Hawaii 1955, even though minors were not expressly excepted therefrom. With this, this Court was in agreement, determining that the common law rule of consensual incapacity of minors which prevails in Hawaii was engrafted to and thus was a part of the land registration act. In this instance, there is no statutory language providing for the removal from the field of conveyancing of registered land of the rule of consensual incapacity of minors. Section 1-1, Revised Laws of Hawaii 1955, requires that the common law apply unless there be judicial precedent or Hawaiian usage to the contrary or unless the statute expressly provides otherwise. Appellant does not cite any precedent or usage to the contrary. On the other hand, the Court has amply demonstrated that common law rule does apply in Hawaii. Appellant merely invokes a rule of construction which is subordinate to the statutory requirements of said section 1-1 (App. Op. Br. 8). The attention of the Court is directed to its opinion in the prior appeal where it is stated:

> **"Furthermore, no instance is quoted or cited to us where the judges have heretofore filled in lacunae**

> in the law upon the subjects under consideration. Therefore, except as expressly otherwise provided, this statute is to be construed in the light of the common law. Furthermore, since the Torrens Land Registration Law was originated in Australia and has been adopted in several states in the Union in a common law atmosphere, the adoption of this test is normal and appropriate." *Pae* v. *Stevens, supra,* pp. 5, 6.

Niblack, in his *An Analysis of the Torrens System of Conveying Land* (1912), states on page 269:

> "Where other remedies are not specially provided, the remedies under the general law will be applied to rights in registered land. It has been held that there is a right to distrain for rent of registered land. The mere fact that a Torrens act does not declare in express words that a registration of title procured by fraud may be set aside as between the parties, does not deprive a court of equity of its general jurisdiction to protect parties from the consequences of fraud."

Similarly here, although the statute does not expressly say that a subsequent registration may be set aside because of the infancy of the transferor, a court in the exercise of its equity powers may rescind such a transfer, especially in view of the fact that in Hawaii the common law rule of consensual incapacity of infants is, by express statute, engrafted in all situations unless otherwise expressly provided.

This result is an application of a principle not original in land registration history. *Gibbs* v. *Messer,* 1890, A.C. 248, House of Lords and Privy Council, announced this principle, that, in the words of the Hawaii Supreme Court (*Pae* v. *Stevens,* Oct. Term 1957, No. 3025, Advance Sheets, pp. 9, 10) the title of a grantee of registered land under a defective

conveyance is not indefeasible, although such conveyance may become the root of an indefeasible title in a subsequent bona fide purchaser for value without notice. The opinion in *Gibbs* v. *Messer, supra,* p. 255, states:

> "Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration."

The opinion (at pp. 257, 258) further states that:

> "Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed."

Here we see the privy council not only (1) engrafting to the law of conveyancing of registered land a common law rule, but also (2) announcing the principle that where there is no statute making a pronouncement to the contrary, a title registered pursuant to a null deed is not indefeasible. We are here dealing not, to be sure, with a void deed, but with a voidable one, but the same conclusion that the title registered in the Freitases is not indefeasible should follow, if the deed were avoided, as there is no statute in Hawaii making a title registered under a voidable deed indefeasible.

Niblack, *ibid.,* in commenting on this case says on page 201:

> "A person about to deal with a registered title, and about to be registered as a new owner of an estate or interest in land, must ascertain at his own peril the existence and identity of the registered owner under whom he is to be registered, *the authority of any person to act for him, and the validity of the transfer under which he is to claim.*" (Emphasis supplied.)

Another authority states that:

> "While recognizing that the grantee named in a forged deed purporting to be signed by the owner of registered land may convey a good title to an innocent purchaser for value, the courts in England and Canada have held that the original transferee under such a forged deed acquires no rights to the land as against the true owner, even though he is not aware that the deed to him was forged. Furthermore one who takes from such a transferee with knowledge that the deed to his grantor was forged also gets nothing. This view has been taken even though the fraud is made possible by the action of the registered owner in entrusting his certificate of title to the forger, the courts taking the position that the original transferee under the forged instrument gets no rights under the Land Registration Act unless he makes certain that the conveyance to him is genuine." 42 A.L.R. 2d, § 4[b], pp. 1392, 1393.

Now appellant in arguing, (App. Op. Br. 9, 10), that in Hawaii registered title is indefeasible, cites three cases in support of the conclusion that therefore in this instance the title of the Freitases should be likewise indefeasible as against appellant. The cases are inapposite. *United States* v. *Fullard-Leo,* 156 F. 2d 756 (9 Cir. 1946), aff'g 66 F. Supp. 774, aff'd 331 U.S. 256, 67 S. Ct. 1287, merely deter-

mined that once an interested party disclaims any interest in the land being registered, he is thereafter barred from claiming an interest therein. *Akagi* v. *Oshita,* 33 Haw. 343 (1935) merely held that a purchaser of registered land took free and clear of an unregistered lease when he was not aware of the lessee's possession of the premises. *Land Title, Bishop Trust,* 35 Haw. 816 (1941) represents an application of section 342-42, Revised Laws of Hawaii 1955, where it is expressly provided that "every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate" and certain other statutory ones which are here not relevant. The word "encumbrance" is defined in 42 C.J.S. at page 549 as a "right to, or interest in, the land which may subsist in third persons, to the dimunition of the value of the land, but consistent with the passing of the fee by the conveyance." This is the ordinary meaning and that this meaning was intended in the use of the word "encumbrance" is substantiated by the kind of encumbrances enumerated and denominated as such in the later portions of the same statute. (See section 342-42, Revised Laws of Hawaii 1955.) A disability on the part of the owner, such as minority, which brings about an incapacity to convey is not an encumbrance. It is not "consistent with the passing of the fee"; it is grounds for the complete negation of the conveyance. Furthermore, in a certificate of title the age of the owner, if a minor, is not noted in the place designated for encumbrances. (See Exhibits "H" and "I", Record on Appeal, pp. 64-67.)

Appellant takes exception (App. Op. Br. 10-12) to the following observation of the Supreme Court:

> "In this case, the certificate of title issued to the plaintiff stated a good title. The Freitases bargained for that title. They did not obtain what they bargained for because the instrument of conveyance was defective, not because the title stated in the certificate was defective. The burden of obtaining an indefeasible conveyance by an appropriate deed was upon the Freitases. The fact that the certificate of title did not contain a notation of plaintiff's age did not make the conveyance the act of a person of full capacity." *Pae* v. *Stevens,* Hawaii Supreme Court, Oct. Term 1957, No. 3025, Advance Sheets, p. 10.

That the burden of obtaining a good conveyance was on the Freitases is settled by *Gibbs* v. *Messer, supra,* and Niblack as mentioned hereinabove. (See pp. 17-19 of this brief.) It is also clear that the notations required on a certificate of title are not all that are necessary to insure an indefeasible conveyance and are not intended to certify such indefeasibility to the prospective purchaser. There is no requirement for the notation of a disability other than minority. Because of this, it surely cannot be said that a conveyance of one who is, following the lead of this Court (see *Pae* v. *Stevens,* No. 15498 (9 Cir. Feb. 18, 1958) p. 9), "a hopeless idiot of full age" is not voidable. To say otherwise would mean the complete reversal of the common law protection which the courts zealously afford those suffering from a disability, and also contrary to the land registration act's purpose of protecting persons under a disability. (See *Pae* v. *Stevens,* No. 15498 (9 Cir. Feb. 18, 1958).)

The indefeasibility of registered title so strongly espoused by appellant and urged as determinative of the appeal is neither correctly understood nor applied. What the land registration act makes indefeasible is the state of title as

noted in the certificate and not the transfer of such title. This is clearly shown by the discussion under section 168 of Niblack's treatise. (Niblack, *ibid.,* pp. 261-264.) Some of the highlights are:

> ". . . the courts have held that where he (registrar) registers a transfer of registered land from the last registered owner, or where he notes on a certificate a mortgage or lien, his functions are not necessarily judicial, but are ministerial, executive, quasi judicial and discretionary, and incidental to the issue of a new certificate, and to the noting of the mortgage or lien, and that his decision in such matters is not conclusive, but may be litigated in any proper manner." p. 261.
>
> "When a ministerial officer acts in a quasi judicial manner, his action is not an adjudication, and is not conclusive on the rights of the parties concerned. At most it may be prima facie correct, for there may be presumption that he performed his duty properly in the premises. It may be set aside in all cases where, in pleading and in evidence, specific acts of fraud, or particular errors and mistakes are shown to have affected it." p. 262.
>
> "The statutes declare that a certificate is conclusive evidence of an indefeasible title in all courts and in all places, but a certificate issued on the transfer of registered land must present the adjudication by the registrar on the rights of all interested persons in order to attain this statutory force and effect. In this country a certificate issued on the transfer of registered land presents, not an adjudication by, but merely the discretionary action of, the registrar, which can be only prima facie binding on persons interested, notwithstanding the statutory declaration of indefeasibility of title." p. 263.

It must be borne in mind throughout this entire discussion that we are here dealing with an immediate and not a sub-

sequent purchaser; the former is considered not as deserving of protection as is the latter and is accordingly left more insecure in his dealings. In the case of forgery, an immediate purchaser is not protected as is a subsequent purchaser. Niblack, in his *An Analysis of the Torrens System of Conveying Land* (1912) (pp. 200, 201), states where a person is registered as a result of a forgery, his registration is null and void, but such registration may be the root of a valid title. This is the system that apparently prevails in Hawaii. (Section 342-38, RLH 1955; Niblack, *ibid.*, p. 210.) Accordingly, the Freitases could have been required to relinquish their title to the disputed land in favor of the appellant, a minor.

IV

PLAINTIFF-APPELLANT FAILED TO MEET THE CONDITION PRECEDENT TO THE ACTION OF CONTRACT AND THEREFORE CANNOT AVAIL HIMSELF OF THIS FORM OF RELIEF.

Appellant failed to meet the condition precedent to the action of contract and therefore cannot avail himself of this form of relief.

The conditions attached to the right of the action of contract provided for in section 342-99 must be met before plaintiff can follow this avenue of relief. This section unequivocally requires that all other rights of action and remedies for the recovery be exhausted. This means that actions for recovery must be instituted and followed through to their conclusion. This requirement is not satisfied merely by an appraisal by the one deprived of land of his chances of succeeding in an action for such recovery and a determination

by him that such suit would be futile. As was said by the Supreme Court in the *Felt & Tarrant* case,

> **"The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.'" 283 U.S. at p. 273.**

This same thought was expressed by Mr. Justice Holmes in the *Rock Island Railroad Company* case:

> **"Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. . . . At all events the words are there in the statute and the regulations, and the Court is of opinion that they mark the conditions of claimant's right." 254 U.S. at p. 143.**

See also *Harvey* v. *Early, supra,* at page 838.

Appellant did not pursue any action for the recovery of his land. His complaint inferentially admits this. (See par. XV of Complaint, Tr. of Rec. p. 10.) It was further stipulated by appellant and the appellee that,

> "Plaintiff [appellant] has not brought any action in any court for the purpose of cancelling or rescinding or attempting to cancel or rescind either the deed or Transfer Certificate of Title No. 21247 to Jordan Freitas and Carrie Freitas." (Tr. of Rec. p. 35.)

His conduct falls short of the requirement of having to exhaust his other remedies, the fulfillment of which was a prerequisite to his action of contract and recovery thereon. The condition precedent not having been satisfied, appellant clearly had no right to recover compensation for his loss from the Treasurer of the Territory of Hawaii.

CONCLUSION

The appellant was required by statute to pursue and exhaust other remedies for the recovery of his land before instituting a suit against the Treasurer of the Territory of Hawaii for compensation for the loss of his land. The Hawaii Supreme Court ruled that there was a remedy available to appellant because of his minority at the time of the transfer which effected the loss he suffered. It is indisputably clear that appellant did not attempt to recover his land.

Under these circumstances, the Hawaii Supreme Court was constrained to affirm the judgment of the lower court denying appellant any compensation. Manifest error does not pervade this judgment. Therefore, we respectfully urge this Court to affirm the judgment below.

DATED: Honolulu, Hawaii, September 22, 1958.

Respectfully submitted,

Henry H. Shigekane

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